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ıuse of Representatives

LANSING, MICHIGAN 48909

MAJORITY FLOOR LEADER

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COMMITTEES ON:
HOUSE OVERSIGHT, CHAIR
LEGISLATIVE COUNCIL

MEMORANDUM

TO: House and Senate Members

FROM: Representative Lewis N. Dodak

DATE: 5 November 1985

RE: Report--House Special Committee on Liability Insurance

Attached for your information is a copy of the report which was issued by the House Special Committee on Liability Insurance

LND:js
J309MKS1

Attach.

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House of Representatives
LANSING, MICHIGAN 48909

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COMMITTEES ON:
HOUSE OVERSIGHT, CHAIR
LEGISLATIVE COUNCIL

October 31, 1985

Speaker Gary M. Owen
Michigan House of Representatives
The Capitol
Lansing, Michigan 48909

Dear Speaker Owen:

On August 12, you asked the House Special Committee on Liability Insurance to study insurance industry practices, ascertain why liability insurance is unavailable and/or unaffordable for many Michigan citizens, and make public policy recommendations to you, by November 1, which address these issues.

During the past seven weeks, the Special Committee on Liability Insurance has met 10 times to hear testimony from 32 expert witnesses. In addition, testimony was taken from 56 people at an all-day public hearing. Those offering testimony presented a wide range of information concerning liability insurance industry practices, insurance regulation, state insurance facilities, physician competence, risk management, business and occupational licensure, legal theories of liability, and the impact of tort reform on liability insurance.

Having heard and reflected on that testimony, the Special Committee on Liability Insurance makes the attached policy recommendations to you and urges that the Michigan House of Representatives introduce legislation and endorse specific administrative action to implement these changes in public policy. You will note that the policy recommendations are in three categories: business and occupational licensure, tort reform, and insurance industry practices and regulation. The recommendations reflect a bipartisan consensus among a majority of the Special Committee's 16 members.

I trust these policy recommendations will assist the House of Representatives as members begin their deliberation on these issues in standing committees.

Sincerely,

Lew Dodak

Representative Lewis N. Dodak, Chair
Committee to Study Liability Insurance

LND:as/A304JH1
Attach.

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SPECIAL COMMITTEE ON LIABILITY INSURANCE

October 31, 1985

We, the members of the Special Committee on Liability Insurance, recommend that the House of Representatives consider the attached proposals.

Rep. Lewis N. Dodak, Chairman

Rep. Don Van Singel

Rep. Michael J. Sennane

Rep. Richard Bandstra

Rep. Mary C. Brown

Rep. Mat J. Dunaskiss

Rep. Perry Bullard

Rep. Alvin J. Hoekman

Rep. William R. Keith

Rep. David M. Honigman

Rep. Matthew McNeely

Rep. Ernest W. Nash

Rep. Lynn Owen

Rep. John G. Strand

Rep. Debbie Stabenow

Rep. Stanley Stopczynski

A304JH2/Attach.

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BUSINESS AND OCCUPATIONAL LICENSURE REFORMS

1. **PROBLEM:** Some argue that the health professional licensing boards have not been as effective as they might be in regulating and disciplining physicians and other health care providers. Removing incompetent physicians from practice or otherwise limiting their activities may help reduce the actual incidence of malpractice.

RESPONSE: (a) Require insurers to notify licensing boards when an award/settlement has been entered against a licensed health care provider.

(b) Enact legislation aimed at improving physician competence, including: granting immunity to members; strengthening a board's ability to impose sanctions; prohibiting or otherwise restricting court stays of board sanctions; requiring the prioritization of complaints; updating administrative processes in the Bureau of Health Services to improve efficiency; updating procedures used by specific licensing boards to monitor educational programs and related technical changes; providing for concurrent renewal of licenses to practice and controlled substances licenses; and requiring hospitals to report disciplinary actions taken against medical staff to the licensing boards.

(c) Increase staffing, as necessary.

2. **PROBLEM:** The ability to impose sanctions sufficient to deter certain activities which could lead to subsequent injuries might help to reduce the incidence of negligence subject to the dram shop act. It has been suggested that existing penalties may be inadequate.

RESPONSE: (a) Increase fines for violations of the Liquor Control Act to a maximum of $2,000; except that in the case of a violation involving sale to a minor or visibly intoxicated person, the maximum fine shall be $5,000.

(b) Strengthen the tie between multiple violations of the liquor control act involving the direct sale of liquor to a minor or a visibly intoxicated person and liquor license revocation or suspension.

(c) Require disciplinary actions against licensed drivers who offer false or altered licenses as proof of identification to buy alcoholic beverages.

3. **PROBLEM:** Instances have occurred where inaccurate or misleading information was given to a patient or placed in the patient's medical record; or, in some cases, the medical record was altered or destroyed.

RESPONSE: Make the furnishing of inaccurate or misleading information to a patient, or altering or otherwise tampering with hospital and medical records a felony.

TVG:as/A304TVG1

TORT REFORM PROPOSALS

INTRODUCTION: The following proposals for reforming the tort system are intended as reforms in all areas of tort law, unless specifically noted. Thus, for example, readers of the report should assume that the recommendations relative to joint and several liability, collateral source, and structured payments will apply to products liability cases in the same manner as they are applied to medical malpractice cases.

1. **PROBLEM:** Payment of large lump-sum awards for future damages by insurers places an undue burden on insurance company reserves while permitting some plaintiffs who receive such awards to spend them frivolously.

RESPONSE: Require structured payments of all awards for future damages, except medical, in excess of $250,000.

MECHANICS: (a) Require juries to separate awards and require settlements to be separated into past and future damages and economic and non-economic damages.

(b) Regulate the annuity contracts which may be purchased to provide for structured settlement payments.

(c) In regulating the structured payments recommended above, it should be made clear that the intent is to provide the plaintiff with an amount equal to the jury verdict as it was determined without the future non-economic damage portion of the verdict being reduced to its present economic value.

NOTE: Because the Special Committee was unable to determine with any degree of finality, the potential tax liability of annuities which would be purchased to fulfill the terms of this recommendation, it is further recommended that final action on this proposal not be completed until an Internal Revenue Service opinion on the tax implications of state mandated structured payments is received or we are advised that such an opinion will not be forthcoming.

2. **PROBLEM:** Plaintiffs are allowed to "double dip" because they may collect medical benefits, no-fault benefits, etc., and still collect compensation for the same costs in a tort claim.

RESPONSE: Permit introduction of evidence after the verdict but before the judgment is entered as to the existence of benefits from collateral sources.

MECHANICS: Reduce the amount of the verdict by the total of all collateral source payments less: plaintiff's cost of purchasing a health insurance or disability policy; life insurance proceeds; workers' compensation; Medicaid; Medicare; social security and any source of compensation which would by law or contract be entitled to a lien against the proceeds of the recovery.

3. PROBLEM: Under the doctrine of joint and several liability as it is applied in a pure comparative negligence system, a defendant who is as little as 5% at fault may be liable for the entire judgment, if his or her joint and severally liable co-defendants are insolvent.

RESPONSE: Modify the doctrine of joint and several liability so that an at fault plaintiff shares a proportional amount of the burden for the insolvent defendant. For example, plaintiff is 40% at fault, defendant A is 30% at fault and defendant B is 30% at fault, and the verdict is for $10,000. Defendant B is insolvent. In this situation, plaintiff and defendant A would share the responsibility in terms of B's insolvency. Thus, plaintiff would receive $3,000 from defendant B and Defendant A's share would be allocated among the plaintiff and defendant B. In reallocating the portions, the formula would be based on each party's relative percent of the total less the insolvent defendant's liability, i.e., the total liability becomes $7,000 and the plaintiff's share of the responsibility for the injury is 40% or 4/7. Defendant B is liable, in addition to the 30% s/he already paid for an additional 3/7. In this situation, Defendant B's share of the damages would be $4,286.

MECHANICS: In order to implement this recommendation, juries must be instructed, in all tort cases, to determine the degree of fault of all parties—both plaintiff and defendant. However, questions of apportioning the burden of insolvency among jointly and severally liable tortfeasors and at fault plaintiffs will be determined by the court—not the jury.

4. PROBLEM: Prejudgment interest is currently charged against defendants at the rate of 12%. Under current law it is tolled, i.e., it stops accruing, from the date an offer is made which is substantially similar to the final award/settlement. The 12% is statutorily set and is intended to encourage resolution of suits; however, there is no penalty assesed when a defendant does not accept a good faith offer of settlement by a plaintiff. The 12% rate was set at a time when high inflation meant that it was not an unreasonable amount of interest. As inflation has abated, the rate appears to be somewhat out of line.

RESPONSE: (a) Make the prejudgment interest rate equal to the auction sale price of 5-year T-bills plus 1%. The rate would be determined annually based on the auction sale price of 5-year T-bills in the July to January period immediately preceding the filing of the claim.

(b) Assess a defendant who fails to accept an offer of settlement made by a plaintiff which is substantially similar to the final award or settlement at a rate equal to twice the prejudgment interest rate provided for above.

NOTE: The definition of "substantially similar" is 90% of the final award or settlement.

5. PROBLEM: The Michigan Supreme Court in the Ross case ruled that governmental units are immune from suit when they are engaged in governmental functions which are those activities expressly or impliedly mandated by state constitution, statute or law. The court then went on to

indicate that officers and upper level decision-making employees are granted the same immunity but it is only granted to lower level officials, employees and agents who are acting in the scope of their employment on discretionary/ decisional functions, i.e., functions which require decision making and the exercise of personal judgment and who are acting in good faith. The effect of this ruling is to leave employees who are carrying out governmental functions without decision-making authority over those functions liable for their tortious conduct, while simultaneously giving the units of government immunity from suit.

The Court also retained the distinction between governmental functions and proprietary functions, i.e., functions conducted primarily for pecuniary profit and not normally supported by taxes or fees.

RESPONSE: (a) Public employees and officers, in addition to those granted immunity under Ross, shall be immune from liability when carrying out a governmental function; when acting or reasonably believing they are acting within the scope of their employment or authority; and when their conduct does not constitute gross negligence or willful and wanton misconduct.

(b) The grant of immunity extended to public employees and officers who are not granted immunity under Ross shall expire on June 30, 1987.

(c) The governmental immunity of public hospitals is waived except as to the Department of Corrections and the Department of Mental Health.

(d) The Speaker of the House of Representatives is requested to appoint a special committee to review governmental immunity for all units of governments and employees. If the committee determines that a new immunity law should be written, it should also recommend the parameters of liability and any possible areas where immunity should be retained.

NOTE: These recommendations are not intended to have any effect on the areas of governmental operations where immunity has been previously waived by statute.

6. PROBLEM: It appears that governmental units, including the state, may not always seek contribution from joint tortfeasors when it is available; subrogate claims when that is an option or establish structured payment schedules. Related to these issues, the state is not currently subject to the prejudgment interest law, which may be a reason why the state generally litigates instead of settles tort claims.

RESPONSE: (a) Require governmental units to seek subrogation or contribution from co-defendants who are jointly and severally liable, where it is appropriate.

(b) Clarify the legality of structured payments for state agencies and encourage the Attorney General or DMB to investigate the utilization of annuities.

(c) Require the state to pay prejudgment interest on tort claims at the same rate as private individuals and corporations.

7. **PROBLEM:** Because of reports of very large jury verdicts, numerous attorneys apparently seek to file claims which have only a marginal relationship to Wayne County in that county in an effort to get a potentially large jury verdict.

RESPONSE: (a) Make the costs of venue motions taxable against the losing party except when the motion for a change of venue is made for the convenience of the parties or on the court's own motion.

(b) Modify the venue statute to establish proper venue in tort claims on a priority basis with the following order of priority: where the injury occurred; where the defendant resides; where the plaintiff resides.

8. **PROBLEM:** Defendants allege that there are many frivolous lawsuits filed and that those suits are very time-consuming and there are often long time delays in securing the resolution of these claims.

RESPONSE: (a) Clarify that attorneys' fees and costs are taxable costs under the court rules and statutes for frivolous claims or defenses.

(b) Allow affidavits of noninvolvement to be submitted in instances where there are multiple defendants named in a lawsuit and permit the plaintiff to file either an objection or a counter affidavit to preclude a party from being automatically removed from the case based on the affidavit of non-involvement.

(c) Require all claims of medical malpractice be accompanied by either a $2,000 bond to cover the costs of defendant, should the plaintiff lose, or an affidavit from a medical expert in the appropriate field of specialization stating that the claim is meritorious. In the event that the required bond or affidavit is not filed within 90 days, the claim may be dismissed without prejudice. The same requirement would be applied to defendants in medical malpractice cases.

(d) Require all medical malpractice claims to be submitted to mediation before trial and grant the mediation panel the authority to make a finding that the claim is frivolous. If such a finding is made by the panel, the plaintiff must post a $5,000 bond--cash or surety--for each party defendant within 21 days in order to proceed to trial. The bond would be used to pay the defendant's costs for proceeding to trial.

(e) Pre-trial mediation panels in medical malpractice cases must include two attorneys and one licensed physician.

(f) Require that all tort claims, except for medical malpractice claims as outlined in (d) above, for an amount in excess of $10,000 be submitted to mediation proceedings prior to trial.

NOTE: It is anticipated that the affidavit provided by the health care professional pursuant to (c) above will be retained by appropriate counsel and that counsel will attest, in an affidavit, as to its existence.

9. **PROBLEM:** Under the Dram Shop Act, all liquor licensees who served an alleged intoxicated person are potentially liable for damages.

RESPONSE: Adopt a rebuttable presumption that only the last licensee could be found liable under the Dram Shop Act.

10. **PROBLEM:** Under the Dram Shop Act, evidence relative to good business practices, e.g., server training of employees and an offer of transportation home, is not admissible as part of a defense.

RESPONSE: Permit the admission of evidence relative to good business practices as part of a defense to a dram shop action.

11. **PROBLEM:** A large number of tort areas, especially medical malpractice, have potentially long "tails" in terms of liability due to the current statutes of limitations. This is especially problematic because of the infancy provisions in the statute of limitations. (The current law for adults is two years from date of last treatment or six months from date of discovery. For infants, it is age 18 or one year after the date the person turns 18.) Another area of difficulty involves contractors who may be liable for damages after the statute of limitations has expired for architects and engineers on the same project.

RESPONSE: (a) The same statute of limitations should apply to contractors, architects and engineers on construction projects.

(b) Modify the statute of limitations relative to infancy for medical malpractice claims only to two years from date of last treatment or two years from date of discovery.

12. **PROBLEM:** Under current practice, the qualifications of expert witnesses are determined by the court in relation to the rules of evidence and other applicable court rules. Allegations have been made that some expert witnesses, particularly as they relate to the standard of care, are "hired guns" who are not, in fact, practicing experts in the appropriate field of medicine.

RESPONSE: (a) Prohibit expert witnesses in medical malpractice cases who are not members of the same medical specialty as the defendant(s) and who are not engaged in teaching or practicing in that field from testifying as to the standard of care.

(b) Require the court to qualify expert witnesses and when doing so to evaluate the educational and professional training of the witness, the witness's area of specialization, length of experience, and relevancy to the proceedings.

(c) Prohibit expert witnesses from testifying on a contingency fee basis.

13. **PROBLEM:** Occasionally, notwithstanding instructions to the contrary, juries award damages which are not supported by the evidence or are influenced by sympathy and prejudice. Trial judges are empowered by the Michigan Court Rules to correct such jury abuses through remittitur. However, the common perception, supported by both the testimony before the Special Committee and reported case law, is that trial judges are extremely hesitant to use this power because they are ordinarily reversed on appeal.

In the appellate courts, there is confusion about the appropriate standard to use in reviewing remittitur standards. Some opinions, including some Supreme Court opinions, say that a judge's decision in this regard must be affirmed unless there is an "abuse of discretion", a hard test to meet. Other opinions adopt a lower standard and reverse upon a finding that the trial judge has committed "clear error". That test results in reversal of remittitur decisions in almost all reported cases.

RESPONSE: Specify that appellate court jurisdiction does not extend to the reversal of a trial judge's decision on remittitur, absent a finding of "abuse of discretion" as that standard has been defined in the courts.

14. **PROBLEM:** In apportioning degrees of fault among the parties, juries are not required to determine the degree of fault of prior settling defendants.

RESPONSE: Although the Special Committee is not making a specific recommendation for revision of the law in this regard, it is requested that the issue be given further consideration by the House Judiciary Committee when it considers the legislation necessary to implement the tort reform recommendations contained in this report.

15. **PROBLEM:** Concern has been expressed (by parties other than plaintiffs in tort cases) that too small a portion of a settlement or award is received by the injured party, especially when the award or settlement is substantial. Further, concern has been expressed that too great a proportion of the liability insurance premium dollar is consumed by legal expenses and operating costs rather than compensation to a party who has been injured as a result of negligence. In response to the medical malpractice crisis of the mid-1970s, the Michigan Supreme Court had adopted a sliding-scale limitation on contingency fees. Subsequently, that limitation was revised to permit contingency fees of as much as one-third of the total received after costs.

RESPONSE: Although the Special Committee is not making a specific recommendation for revision of the law, it is requested that the issue of limiting contingency-fee agreements be given further consideration by the House Judiciary Committee when it considers the legislation necessary to implement the tort reform recommendations contained in this report. In discussing this issue, the Special Committee would suggest that the Judiciary Committee consider the possibility of enacting the sliding-scale limitations which had been in place prior to the current court rule on contingency fees.

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COMMERCIAL LIABILITY INSURANCE REFORM

1. **PROBLEM:** Under our current system, most medical maloccurrences do not result in the filing of a claim. Often the damages they produce are not large enough to make litigation worthwhile or the victims do not wish to enter into an adversarial relationship with the health care provider(s) involved. Therefore, the injured victims are not compensated.

Under a no-fault system, most, if not all, injured parties could be compensated without litigation.

The difficulty with such a system is that it is likely to be more costly than the present system, because only a very small percentage of maloccurrences currently result in compensation to the injured party. Additionally, litigation might still result, because the auto no-fault system still generates significant activity in the area of first-party claims.

RESPONSE: Establish a no-fault system for "medical misadventures", i.e., bad outcomes which do not necessarily constitute medical malpractice. This is proposed as a subject for study and possible long-term application.

2. **PROBLEM:** Testimony presented to the Special Committee indicated that the insurance industry (especially re-insurers) are considering issuing only claims-made policies.

Claims-made policies only cover claims submitted during the term of the policy. Conversely, occurrence policies cover any incident which occurs during the policy period, regardless of when the claim is filed. Insurers believe that a shift to claims-made policies will substantially increase the predictability of losses. However, this shift may create major gaps in coverage as policy periods overlap, coverage is altered, policies are canceled, or simply not renewed.

Staff members of the Insurance Bureau inform us that they are currently participating with other states to resolve the difficulties generated by claims-made policies and feel that, with limits on cancellation and adequate notice provisions, they can arrive at acceptable solutions to the problem.

Commercial liability insurers can now cancel policies with only 10 days' notice to their insureds. This can place the insured in a very difficult situation with respect to maintaining continuous coverage. A 90-day-rule prior-notice requirement would help to alleviate this difficulty.

RESPONSE: (a) Make mid-term cancellations of claims-made liability insurance policies an unfair trade practice. Provide for an exception to this rule in situations where the risk materially changes or for non-payment of the premium.

(b) Require a minimum 90-day prior notice of all commercial policy cancellations or non-renewals. Provide for an exception to this rule where the risk materially changes or where the policy is canceled for non-payment of premium.

3. **PROBLEM:** Only three major insurers currently market medical malpractice insurance coverage in Michigan. The two Michigan companies are currently writing over capacity. One of them cannot get reinsurance. The availability of this line of coverage may be in jeopardy.

If Blue Cross/Blue Shield of Michigan is allowed to participate in this line of coverage, it will result in increased availability, and, generally, increased capital for the line. They do have knowledge of the health care delivery system and may bring some risk-management expertise to the line. It is, however, important to protect the current market from unhealthy competition and to ensure that dollars invested are for the benefit of Michigan business.

RESPONSE: Authorize Blue Cross/Blue Shield of Michigan to invest in companies who sell medical malpractice coverage in Michigan, particularly those who sell excess coverage or reinsurance.

4. **PROBLEM:** Testimony presented to the Special Committee, as well as literature in the field, has pointed out that the effects of the cyclic nature of the insurance industry can be devastating. The literature indicates that there is a need to control underpricing for market shares and to better regulate solvency in the commercial liability lines.

Currently, the Insurance Bureau is limited in both authority and resources with respect to its ability to regulate these lines, and, thus, reduce the effect of insurance cycles.

RESPONSE: (a) Revise the statutory definition of the adequacy of rates to prevent inadequate rates; i.e., change the current regulatory language to say that a rate shall not be held to be inadequate unless the rate AFTER CONSIDERATION OF INVESTMENT INCOME is unreasonably low for the insurance coverage provided and IS INSUFFICIENT TO SUSTAIN PROJECTED LOSSES AND EXPENSES.

(b) Require actuarial certification by a fellow or associate of the Casualty Actuarial Society of Liability Insurers of loss reserves annually (for all Schedule P lines, both domestic and foreign), to be received by the Insurance Bureau, and a requirement for continued licensure. (Schedule P lines are those liability lines with a long "tail.") Provide that a minimum level of business or a dollar amount of premium dollars determine the necessity for this certification or that it be waived at the discretion of the Insurance Commissioner when it is determined unnecessary.

(c) (1) Revise the reporting statutes to get necessary information, but with less burden on the insurers; implement the paperwork reduction provisions previously proposed in HB 4715.

(2) Require the reporting of all claims experience in all cases of claims incidence, similar to that required on Forms A and B, relative to medical malpractice and all municipality liability experience. Collect data from all self insureds, pools and other carriers. Consider collecting claims data from attorneys.

(3) Eliminate the current reporting requirements for Products Liability lines and for Municipal Liability lines.

(d) Take early steps to rehabilitate insurers who are found to have inadequate reserves; this might include a requirement that a plan be submitted to the Insurance Bureau to correct the situation within a specified period of time, or the imposition of other sanctions; i.e., limits on the book of business, etc.

(e) Provide adequate staff and training resources for the Insurance Bureau so that it can fulfill its regulatory functions; current audits are on a 5-7 year cycle; one medical malpractice insurer has not been audited since 1976, its first year of business; provide the bureau with increased actuarial staff--a lack of this kind of staff has previously resulted in significant problems.

(f) Provide increased automated systems and statistical support for the Insurance Bureau; data cannot be collected, nor reports formulated, without adequate systems support. This is a part of the reason for the paucity of medical malpractice insurance data.

(g) Require tri-annual field as well as in-house auditing of insurers. (This includes domestic insurers.)

(h) Increase regulation of insurance agents by increasing pre-licensing education requirements.

(i) Require that the Insurance Bureau publish a report every two years which describes the condition of medical malpractice insurance in the state and contains information regarding specific claims experience and recommendations.

5. **PROBLEM:** Currently, many governmental entities and bar owners are uninsured. Some govenmental units have elected to self-insure in a manner which essentially constitutes being uninsured. Many bar owners have no form of coverage. Some health care providers are uninsured, although it appears that they constitute a small percentage of the overall health care provider population. It is possible that more medical care providers may become uninsured or find it more difficult to find coverage, because one of the major carriers in this line is threatening to leave the state. The other two major medical malpractice insurers would not be able to pick up greater numbers of insureds because they are already writing far out of capacity.

The current availability problem has occurred as a result of the effects of the insurance cycle. We are advised by insurance industry experts that it is likely that the severity of this situation will decrease over the next few years; however, those who are in need of coverage need something done now. Additionally, the creation of a fund will allow the Legislature and the Executive Branch time to put appropriate regulatory functions and data collection operations into operation toward the resolution of the overall problem.

RESPONSE: (a) Require mandatory insurance of licensed beverage establishments and health care providers (doctors, dentists, nurse specialists, hospitals, podiatrists) unless they are part of an approved

self-insurance program. Allow licensed beverage establishments to substitute proof of financial responsibility to meet the requirement. Establish a state insurance mechanism or facility to provide coverage for groups for which commercial liability coverage is mandatory, where no coverage is available in the private market. Provide that the state mechanism also offer excess coverage to these groups.

(b) Recommend that the following proposal receive further study by the House Committee on Insurance and by the Governor's factfinder for Medical Malpractice Liability Insurance:

Create a state insurance mechanism or facility for governmental units, day care providers, and possibly, others, such as residential care facilities, who cannot obtain commercial liability insurance in the private market.

6. PROBLEM: The reinsurance market in Michigan has tightened considerably over the past two years. This has occurred because of a reduction of capital for this market nationally and even on a world-wide basis. Consequently, it is difficult for the Michigan Legislature to do anything that would significantly affect this market.

Insurance industry experts predict that it is likely that this market may soften to some extent beginning in about 1987. Hopefully, reinsurance may be somewhat easier to purchase at that time. In the meantime, it may be possible to create a state reinsurance fund to assist those who are in need of this kind of coverage.

The need for excess coverage is probably more significant for those in the medical profession and for government entities. It may be necessary to create some form of reinsurance or excess coverage for these entities. The availability of reinsurance will serve to stabilize the primary market. Currently, some insurers cannot obtain reinsurance. Additionally, reinsurance is necessary to cover the levels of loss experience for some insureds. It will be particularly critical for physicians to be able to obtain this coverage, should the rules on joint and several liability be revised.

A catastrophic claims fund might also be needed to cover certain severe losses. The state already employs such a fund for auto no-fault coverage for losses which exceed $250,000.

RESPONSE: Recommend that the following proposals receive further study by the House Committee on Insurance and the Governor's factfinder for Medical Malpractice Liability Insurance:

(a) Establish a state reinsurance mechanism. It is particularly important that the reinsurance mechanism receive consideration soon, because it is likely that the self-insured pools which are being authorized will need access to this kind of coverage in the near future.

(b) Create a catastrophic claims fund.

7. **PROBLEM:** Currently, the guarantee fund does not acutally exist until an insurer actually "goes under". If this happens, all insurers who write in either the health/life or property/casualty line are assessed according to the amount of the premiums they write in order to pay for the losses left by the insolvent insurer. This can be a significant burden to absorb and can have serious economic implications. If an assessment were made in advance and if the funds were invested, this would provide for greater economic stability for the industry.

Each insurer could be assessed at some appropriate time. Possibly, it would be appropriate to assess new insurers at the conclusion of the insurer's third year in business. Additional assessments could be made as they are found to be necessary to maintain the stability of the fund. This would need to be done in conjunction with other regulatory reforms which would serve to reduce the possibility of insolvencies.

RESPONSE: Recommend that the following proposal receive further study by the House Committee on Insurance and the Governor's factfinder for Medical Malpractice Liability Insurance:

Pre-fund the guarantee fund.

8. **PROBLEM:** It has been difficult to adequately regulate rates in the liability insurance lines. Consequently, for several years prior to the current "crises," rates in some lines were set too low to provide adequate coverage for the long claims "tail." About two years ago many insurers found themselves without sufficient funds to cover the long tail claims. When the need to increase capital arose, many insureds experienced huge premium increases which had no relation to their claims experience.

Some underwriting practices employed by insureds in the lines which are currently in trouble are somewhat arbitrary and provide for surcharges which are not actuarily justified. A system which based rate increases or decreases on merit and experience would be more equitable and would tend to reward risk-management behavior and penalize carelessness.

Therefore, the purpose of this proposal is to encourage better risk-management practices with financial incentives and to discourage negligent practices in the same way. If an insured practices risk reduction, he or she should experience lower rates. If an insured does not employ these practices and has a poor claims record, he or she should experience substantial rate increases. The rating factors, however, should be rational.

This kind of rating regulation is currently employed in home and auto coverage. In the commercial liability lines, the criteria would have to be somewhat less extensive and detailed because the pool of insureds is smaller and it is more difficult to quantify risk; however, some controls could still be employed.

RESPONSE: Tie rating schedules to risk-management efforts.

9. **PROBLEM:** Some groups, such as bar owners, are finding it difficult to secure coverage at any price. Many are interested in forming their own self-insured groups. The only problem with this plan is that we have found that it is poor public policy to allow persons without insurance expertise to act as insurers. This is not likely to work unless that same capitalization and other industry standards are applied to these groups. Groups such as this often fail and are not covered by the guarantee fund. When this happens, insureds are left with no funds to pay their claims.

If these groups are required to meet the standards generally met by the insurance industry, it is likely that they will remain as stable as the rest of the market.

Allowing such groups to form will help to diminish the availability problem which is being experienced in the commercial liability lines of liability coverage in the state.

RESPONSE: Authorize group commercial liability self-insurance of similar professional or business groups--e.g., bars--provided they meet the minimum capitalization standards and other regulatory requirements of a licensed carrier. Monitor pools and other self-insurance mechanisms for solvency as if they were admitted carriers.

LM:as
A304LM1

HOUSE OF REPRESENTATIVES
LANSING, MICHIGAN

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MINORITY FLOOR LEADER
COMMITTEES:
TAXATION
INSURANCE
HOUSE OVERSIGHT

October 31, 1985

Representative Lewis Dodak, Chairman
Special Committee on Liability Insurance Costs
The State Capitol
Lansing, Michigan 48909

Dear Lew:

I want to take this opportunity to compliment you for the fine job you did as chair of the Special Committee on Liability Insurance. Your diligent efforts to work cooperatively in a bi-partisan fashion on such an important and complex issue are appreciated.

I do, however, want to indicate some concerns I have on the final report.

First, I question whether the bond/affidavit system for medical malpractice will be as effective in reducing frivolous claims as a pre-screening panel.

Second, the two years from date of discovery for a statute of limitations appears to be rather open-ended and may create greater uncertainty about future claims.

Third, I have some concerns about the state mandating insurance coverages on its citizens. This will require careful study and evaluation before it can be implemented.

Sincerely,

DONALD VAN SINGEL
State Representative
19th District

DVS/gc

DISTRICT NINETY-FIVE
ALVIN J. HOEKMAN
STATE CAPITOL
LANSING, MICHIGAN 48909
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HOUSE OF REPRESENTATIVES
LANSING, MICHIGAN

COMMITTEES:
MARINE AFFAIRS AND PORT DEVELOPMENT, MIN. V-CHAIR
TRANSPORTATION
CONSUMERS
INSURANCE

October 31, 1985

Representative Lewis Dodak
Michigan House of Representatives
State Capitol
Lansing, MI 48909

Dear Representative Dodak:

I would like to congratulate you on the very fine work on conducting the Special House Committee on Liability. You maintained decorum and kept it "on track" and that in itself is an accomplishment. Congratulations and thank you for a job well done.

It is with some reluctance that I sign the report of the Special House Committee. I believe that the issues causing the liability crisis in Michigan have not been sufficiently addressed nor have the solutions been thoroughlythought out. The following are my concerns:

First, we failed to place any type of "caps" on non-economic issues. I believe this only sends a message to insurers and attornies that we are "wide open" in Michigan. The Rand Corporation study supports the idea and states the savings involved. I believe if we had placed "caps" in this area we would have sent the message that we want to control the issue and the market place for insurance would return.

Second, it is my opinion that the bond/affidavit proposal will do very little, if anything to eliminate frivolous claims. I believe we must have a screening panel to eliminate the frivolous claims and that panel should be composed of neutral and qualified individuals.

Third, I believe that the victim or plaintiff is being "ripped off" in the process by exorbitant attorney and legal fees. NCSL estimates that only 28 to 40 cents of each premium dollar ultimately goes to injured parties and the Rand study supports that statement. This must be addressed by placing attorney and legal fees on a sliding scale basis. Other states have done this and it is working to save money in the court system, reducing case loads and lowering the costs to insurance companies while increasing the amounts that the plaintiffs are actually receiving.

Finally, it is a concern that we did not look at how the courts were interpreting the current laws. I happen to believe that the courts and legal system are making law rather than interpreting thus not following the intent of past legislatures and the laws that were inacted.

Thank you for allowing me to voice my concerns.

Sincerely,

Alvin J. Hoekman

Alvin J. Hoekman
State Representative
95th District

AJH/bmr

MAT DUNASKISS

MICHIGAN STATE REPRESENTATIVE
61ST DISTRICT

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COMMITTEE MEMBER:
ASSISTANT MINORITY FLOOR LEADER
PUBLIC HEALTH, MINORITY VICE-CHAIRMAN
CORPORATIONS AND FINANCE
TRANSPORTATION
LIQUOR CONTROL

November 1, 1985

Representative Lewis N. Dodak
Michigan House of Representatives
State Capitol Building
Lansing, Michigan 48909

Dear Representative Dodak:

I believe this report is a good starting point for tort reform, however I do feel that a few key points have been missed.

First and foremost, I strongly favor limiting pain and suffering awards to $250,000 as they are inherently arbitrary and often based upon emotional, non-documented factors. I do not support limiting medical benefits nor do I support limiting damages for lost wages.

This limitation will help reduce costs for all Michigan residents. The Rand Corporation shows that there is a 19 percent reduction in the size of awards in states that have placed caps on awards. There is absolutely no evidence that "the ceiling becomes the floor" as some people have suggested.

Secondly, a great deal of testimony has been brought forth by local units of government and hospitals where a defendant who is as little as five percent at fault may be liable for the entire judgement. The committee's joint and several liability proposal and committee report still holds a peripheral defendant liable for the primary defendant. I believe if a defendant is less than 15 percent at fault he should not be liable for damages. I would prefer a straight comparative negligence test or at least one that assesses the defendant for only the portion of their negligence if they are under 50 percent at fault.

Third, the report in section eight attempts to find some form of mediation. In my opinion, we need a true screening panel for all medical malpractice cases. The screening panel should evaluate whether the medical standard of care is observed and a report should be made in a timely manner.

Fourth, section eleven has the potential of being the greatest cost saver in medical malpractice as we had representatives from the Insurance Commissioner's office testify that a large portion of medical malpractice has long "tails" in terms of liability. I feel that this section should read "two years of the date of injurious treatment". Some reasonable exceptions to this provision could be made, but, the current standard contains a large loophole that permits lawsuits to be brought many, many

years after the fact.

Fifth, section nine, where Dram Shop reform is discussed, a major provision is left out which is, however, incorporated in House Bill 4550, Substitute H-5. It is only appropriate that the alleged intoxicated person be barred from bringing suit against a liquor licensee in his or her own name. Additionally, if the alleged intoxicated person has no basis for recovery, then no derivative action should be allowed in the part of the family of the alleged intoxicated person.

Sixth, although mandatory insurance is very tempting for liquor license holders and some health care professionals, I am very concerned about the vagueness of section five under Insurance Liability Reform in regards to the cost, type and who should be included for mandatory insurance. Specifics on how this would work have not been developed by the proponents of this recommendation.

Finally, the report calls for no less than four different studies in regards to insurance reform, much of which deals with state run insurance pools, as called for under section six and seven. I believe if we do our work in tort reform we will not need the state's involvement in establishing insurance pools.

The emphasis and work should continue on meaningful tort reform.

Sincerely,

MAT J. DUNASKISS
State Representative

MJD:jc

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HOUSE OF REPRESENTATIVES
LANSING, MICHIGAN

ASSISTANT CAUCUS CHAIRMAN
COMMITTEES ON:
HOUSE OVERSIGHT
JUDICIARY
INSURANCE
MENTAL HEALTH

November 1, 1985

The Honorable Lewis N. Dodak
Michigan House of Representatives
State Capitol
Lansing, MI 48909

Dear Representative Dodak:

I want to thank you for your work as Chair of the House Special Committee on Liabiity Insurance. I feel that you have worked hard to maintain a bipartisan spirit in the committee. This is reflected in the final report, which was adopted only after several hearings and after ample opportunity was afforded committee members to have their views heard.

I do have certain reservations about the final report.

First, I am concerned about the mandatory insurance requirement outlined in Insurance Reform Proposal #5(a). While I am receptive to the concept of mandatory insurance in theory, I have concerns about how such a system would work in practice. The amounts and types of coverages are not specified in the proposal and I am concerned about the effects on the specific groups involved. For these reasons, I will carefully examine the proposed legislation when it is introduced.

Second, I have concerns whether the bond/affidavit system for medical malpractice claims, outlined in Tort Reform Proposal #8(c), will effectively discourage frivolous claims to be filed. Without effective sanctions against certain medical experts who might abuse the system by routinely signing such affidavits, the proposed solution might not be effective. While I have some reservations about a screening panel system, I believe that such a panel - composed of neutral and qualififed persons - which could examine claims before they are filed in court, might be a more effective deterrent to stopping frivolous claims.

Third, the proposed statute of limitations for medical malpractice claims, as outlined in Tort Reform Proposal #11 (b), is not responsive to the problem of the long "tail" for liability insurance. In fact, in some instances, the committee proposal may actually broaden the statute of limitations.

Sincerely,

John Strand

Representative John Strand

JS/ae

HOUSE OF REPRESENTATIVES
LANSING, MICHIGAN

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COMMITTEES:
COLLEGES AND UNIVERSITIES
PUBLIC HEALTH
CONSERVATION AND ENVIRONMENT

November 1, 1985

The Hon. Lew Dodak
State Capitol Bldg.
Lansing, MI 48909

RE: SPECIAL COMMITTEE ON LIABILITY INSURANCE

Dear Representative Dodak:

I enjoyed working with you and other members of the House on the Special Committee on Liability Insurance. I believe it was truly a bi-partisan effort and resulted in a bi-partisan Report. However, following up on your invitation, I would like to record one concern I have about the Report.

The recommendations in Tort Reform Proposal #8 will only eliminate frivolous claims long after suits are commenced. I believe that, in the medical malpractice area, a neutral and qualified screening panel should be instituted to examine claims before they are filed in court. I believe that our Committee did not have the time or information necessary to consider the various options that might make such a pre-filing panel workable and fair. I hope that the standing committee to which Proposal #8 is assigned will look into this further.

Sincerely,

Richard Bandstra

Richard A. Bandstra
State Representative
93rd District

RAB/arm